No. 92-1991

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

CHARLES S. DEAN,
Sheriff of Citrus County, Florida, and
ROBERT A. BUTTERWORTH, the Attorney General
of the State of Florida,

Petitioners,

v.

JOSEPH RICHARD REDNER,

Respondent.

**Petition for Writ of Certiorari to
The United States Court of Appeals
for the Eleventh Circuit**

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED (RESTATED)

1. Whether the Motion of Attorney General Butterworth, Appendix C to Petition, was a Motion pursuant to Rule 59(e), Fed.R.Civ.P., and therefore nullified the previous Notice of Appeal, or whether it was merely an application for collateral relief, related to costs, which does not nullify the Notice of Appeal.

LIST OF PARTIES

Petitioner Dean (who was an Appellant in the proceedings below) was a Respondent in the initial habeas corpus proceedings in the district court. Co-Petitioner Butterworth, the Attorney General for the State of Florida, was also an Appellant in the proceedings below and a Respondent in the district court. Respondent Redner (who was Appellee in the proceedings below) was the Petitioner for the writ of habeas corpus in the district court.

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OPINIONS BELOW

The Order of the Eleventh Circuit Court of Appeals dismissing the appeal below is reported at 935 F.2d 1297 (11th Cir. 1993). The Order is reprinted as Appendix J to the Petition herein.

The Orders of the District Court are unpublished and are reprinted as Appendices A and G to the Petition.

JURISDICTION

The Court has jurisdiction to review the Order of the Eleventh Circuit Court of Appeals, pursuant to 28 U.S.C. § 1254(1). Petitioner timely invoked the jurisdiction of this Court.

CONSTITUTIONAL, STATUTORY, AND ORDINANCE PROVISIONS

Rule 54(d), Fed.R.Civ.P.:

"**Costs.** Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; ..."

Rule 58, Fed.R.Civ.P.:

"**Entry of Judgment.** ... Entry of judgment shall not be delayed for the taxing of costs."

Rule 59(e), Fed.R.Civ.P.:

"**Motion to Alter or Amend a Judgment.** A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 4(a)(4), Fed.R.App.P.:

"If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: ... (iii) under Rule 59 to alter or amend the judgment ..., the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying *any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above*. No additional fees shall be required for such filing." (Emphasis Added).

28 U.S.C. § 1291 states:

"The courts of appeal (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court ..."

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STATEMENT OF THE CASE

As correctly stated in the Petition, this matter began as a habeas corpus proceeding in the United States District Court, Middle District of Florida. Respondent, Joseph Richard Redner (Redner), sued the Sheriff of Citrus County, Florida, Charles S. Dean (Dean), alleging as petitioner in the district court that he was illegally "restrained" because the Citrus County Ordinance under which he was convicted was unconstitutional. As a procedural requirement, the Attorney General of the State of Florida, Robert Butterworth (Butterworth) was named as a respondent, as the chief law enforcement officer of the state.

On May 18, 1992, the district court approved in its entirety the report and recommendation of the magistrate judge to whom the matter had been referred, which concluded that the underlying ordinance was unconstitutional. An order granting the petition for writ of habeas corpus was entered, directing that "the necessary steps be taken to set aside [Respondent Redner's] conviction and to discharge him from any restraint." A judgment in a civil action was entered in accordance with the order, allowing for the assessment of costs pursuant to 28 U.S.C. § 1920 (Petition Appendix A).

On May 20, 1992, Butterworth filed a motion with the district court entitled "Motion for Relief from Judgment, Motion to Amend Judgment" (Petition Appendix C). In the motion, the Attorney General requested that any costs assessed pursuant to the civil judgment be assessed against Dean only, and that the *judgment be amended to relieve Butterworth from the other requirements of the judgment*. This requested relief was consistent with an earlier motion

filed by the Attorney General, moving to delete the state as a party because, "the state's interest in the instant proceeding was peripheral," and pointing out that Redner had been detained in the county jail not, as the result of the State of Florida's actions, but as the result of the Citrus County ordinance (See Petition Appendix C; pp. C1, C2). The Motion for Relief from Judgment, Motion to Amend Judgment (Petition Appendix C) specifically invoked Rule 59(e), Fed.R.Civ.P. as its jurisdictional basis.

Apparently failing to appreciate the provisions of Rule 4(a)(4), Fed.R.App.P., which states essentially that any motion timely filed under Rule 59 tolls the time for filing a notice of appeal, and any notice of appeal filed before the disposition of a Rule 59 motion shall have no effect, Dean filed on June 17, 1992, a notice of appeal from the district court's May 18, 1992, civil judgment (Petition Appendix B).

On June 22, 1992, Attorney General Butterworth filed a Notice of Premature Filing of Notice of Appeal, specifying the pendency of the Rule 59 motion and the application of Rule 4(a)(4), Fed.R.App.P. (Petition Appendix E). Nonetheless, on August 19, 1992, the United States Court of Appeals for the Eleventh Circuit requested jurisdictional briefs regarding the effectiveness of the June 17, 1992, notice of appeal.

On September 15, 1992, the district court granted the motion of the Florida Attorney General (Petition Appendix G), and entered an amended judgment "to relieve Co-Petitioner Butterworth from the responsibility for costs and of setting aside [Respondent Redner's] judgment of conviction" (Petition Appendix H). On October 13, 1992, Dean filed a second, separate notice of appeal, appealing

only the September 15, 1992 amended civil judgment (Petition Appendix I).[1]

On January 20, 1993, the Eleventh Circuit properly evaluated the import of Rule 59(e) Fed.R.Civ.P., and Rule 4(a)(4) Fed.R.App.P., and dismissed the appeal from the May 18, 1992, judgment "for lack of jurisdiction" (Petition Appendix J).

The instant petition for writ of certiorari seeks review of the court of appeals' January 20, 1993, dismissal of the original appeal, suggesting that the circuit court improperly misconstrued the Florida Attorney General's post-judgment motion "concerning costs as a Rule 59(e) motion ..."[2] Even though the attorney general's motion specifically identifies Rule 59(e) as its jurisdictional basis and the motion does not simply concern costs, but was clearly a "Motion for Relief from Judgment, Motion to Amend Judgment", Petitioner Dean asserts this conflicts with decisions from this Court concerning the collateral nature of post-judgment motions and orders "addressing issues of costs."

The Eleventh Circuit made no error, and the instant Brief in Opposition to Petition is filed to establish this fact.

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[1]Whether this second Notice of Appeal encompassed the entire judgment of the District Court is presently pending before the Eleventh Circuit Court of Appeals (Case No. 92-3033, see, e.g., Petition at 4, footnote 5, Appendix M), and is not before this Court in this matter. The sole issue in this appeal is the validity vel non of the original notice of appeal.

[2]Petition for Writ of Certiorari, p. 5.

SUMMARY OF THE ARGUMENT

The Attorney General's Motion for Relief from Judgment, Motion to Amend Judgment was a motion under Rule 59(e), Fed.R.Civ.P., and it had the effect of nullifying the Notice of Appeal filed during its pendency. Therefore, there was no timely Notice of Appeal, and the Eleventh Circuit Court of Appeals properly dismissed the Appeal.

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ARGUMENT

I. THE ATTORNEY GENERAL'S MOTION FOR RELIEF FROM JUDGMENT, MOTION TO AMEND JUDGMENT WAS A MOTION UNDER RULE 59(E), FED.R.CIV.P., AND IT HAD THE EFFECT OF NULLIFYING THE NOTICE OF APPEAL FILED DURING ITS PENDENCY. THEREFORE, THERE WAS NO TIMELY NOTICE OF APPEAL, AND THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY DISMISSED THE APPEAL.

The gravamen of Petitioner's argument to this Court is that the Attorney General's Motion was a *collateral* attack on the judgment, dealt *only* with costs, and did not go to the substance of the judgment. This argument is entirely without merit.

As set forth in the Statement of the Case, *supra*, the Attorney General's Motion sought to alter or amend the District Court's original judgment in two material respects: with respect to the responsibility to release Redner from custody, and with respect to the responsibility for Redner's costs in this petition. Petitioner Dean misstates the legal and factual bases of the Attorney General's Motion.

The Attorney General's interest in being relieved from responsibility to release Redner from custody was not a minor interest. Although all parties concur that the Attorney General is, for the most part, a nominal party to this action, if the invalidity of the ordinance pursuant to which Redner was incarcerated and restrained is maintained, then Redner has very significant claims against all those held responsible for his incarceration, not only for his wrongful incarceration, but also for the loss of business

and the other actual damages he suffered. This concern goes far beyond the collateral issue of costs.

It was thus obviously of great importance to the Attorney General that the final judgment of the district court in this habeas corpus action be amended to relieve the Attorney General from all the requirements enumerated in the original judgment. This consideration included several issues far more elaborate than simply the costs awarded by the district court.

Therefore, even if Petitioner has properly argued the law with respect to the cost aspect of the Attorney General's Motion (and Redner contends that he has not), the other prong of the relief sought by the Attorney General (to be relieved from responsibility for Redner's continued incarceration) clearly was fundamental to the original judgment and was a Motion to Alter or Amend a Judgment, fully within the meaning of Rule 59(e), Fed.R.Civ.P.

In addition to the obvious factual considerations:

- That the Attorney General's Motion was styled in part, a Motion to Amend Judgment;
- That the Attorney General's Motion invoked Rule 59(e), Fed.R.Civ.P.
- That the District Court *ultimately did amend* its judgment,

it is self-evident that the Attorney General's motion went to the fundamental merits of the original judgment of the district court--responsibility for Redner's incarceration, and not simply the collateral issue of costs.

Petitioner's arguments related to motions for attorney's fees not having an impact on the finality of a judgment are accurate but immaterial and misleading. Attorney's fees are clearly a collateral issue, totally unrelated to the merits or fundamental findings of a final judgment. Had the Motion before the district court been related to attorney's fees, Redner would concede that the original Notice of Appeal was timely and valid. In any event, however, there was *never* an issue regarding attorney's fees before the district court or the Eleventh Circuit.

Even Petitioner's efforts to rely on the law related to motions to tax costs do not change the fact that Petitioner's initial notice of appeal was untimely and invalid. The cases cited by Petitioner on this point generally go to the consideration of an *original* order on the issue of costs. In the instant case, the final judgment, prior to its amendment, disposed of the issue of costs.

The Amended Final Judgment amended the responsibility for the costs, but did not originally award costs. Therefore, even solely on the issue of costs, the Motion and Order both fall under the purview of Rule 59(e), and nullified the original notice of appeal as specifically stated in Rule 4(a)(4) Fed.R.App.P.

However, in the instant case, the Attorney General's Motion, and the resulting Order, dealt with far more than the issue of costs. They both dealt with the immediate issue of custody and, by implication, the longer term issue of civil liability to Redner.

Further proof of the full scope of the Attorney General's concerns is found in the Attorney General's earlier motion to be dismissed from this case, which the

district court rejected. However, when the final judgment was entered, and became available as a predicate to liability, the proper amendment to the final judgment had the effect of addressing the merits of the action, and of relieving the Attorney General of the responsibility for Redner's wrongful restraint, and thus of potential liability.

These facts leave absolutely no question that this prong of the Attorney General's motion was a request to amend judgment as contemplated by, and under the purview of Rule 59(e), and therefore clearly nullified the original notice of appeal.

As Petitioner notes (Petition, p. 7):

> "By the 1979 amendments to the Federal Rules of Appellate Procedure, 'the district court was given express authority to entertain a timely motion to alter or amend the judgment under Rule 59, even after a notice of appeal has been filed.' *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 59, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). [3] 'The 1979 amendments eliminated the potential for conflict' between courts of appeal and district courts having concurrent jurisdiction to modify simultaneously the same judgment, 'by depriving the courts of appeal of jurisdiction in such (Rule 59) situations.' *Id.* at 60, 103 S.Ct. at 403.

As this Court stated in *Griggs*, with the timely filing of a Rule 59 Motion, the "appeal simply self-destructs."; and

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[3] The case upon which the Circuit Court relied, Petition, Appendix J, p. 2.

the notice of appeal is "not merely defective, it [is] a nullity." *Id.* at 60, 61, 103 S.Ct. at 403. In this case, Dean's original Notice of Appeal has self-destructed, and the Eleventh Circuit was correct in its ruling.

In *Griggs*, this Court went on to hold:

> "Under the plain language of the current Rule, a premature notice of appeal 'shall have no effect'; a new notice of appeal 'must be filed.' In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction of to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional." *Id.*

Also, as this Court noted in *Buchanan v. Stanships*, 485 U.S. 265, 108 S.Ct. 1130, (1988), assessment of costs "does not involve reconsideration of any aspect of the decision on the merits." *Id.* at 485 U.S. 265, 108 S.Ct. 1131-32. *But in this case, costs had already been assessed, and the motion was to amend that assessment.* Further, the District Court's Order *specifically amends* its previous judgment with respect to the role of the Attorney General.

Dispositive of the entire basis for the Petition is the fact that the Attorney General's Motion had a second prong beyond the issue of costs: the Attorney General also sought to amend the judgment to relieve him from responsibility for Redner's incarceration. Therefore, the Attorney General's Motion was not collateral to the element of the judgment, but rather went to the fundamental and jurisdictional issues of release from custody and, implicitly, liability for any illegal restraint.

Petitioner suggests that the decision of the Court of Appeals "inexplicably", in this case, departed from its previous holdings, in *Alimenta, Inc. v. Anheuser-Busch Co.*, 803 F.2d 1160, (11th Cir. 1986); and *Lucas v. Florida Power & Light Co.*, 729 F.2d 1300 (11th Cir. 1984). The Circuit Court's dismissal is not inexplicable, it is completely consistent with the distinction between original applications for costs and applications to amend cost awards. Further, the Eleventh Circuit properly recognized the critical, fundamental and jurisdictional fact that the Attorney General's Motion sought relief not only on the issue of costs, but also on the issue of custody, and, undeniably, the potentiality of liability for illegal custody.

Further, dispositive of this issue, is a holding of the Third Circuit:

> "We are not insensitive to the fact that this result places upon the party seeking to appeal the obligation to determine for itself whether a motion denominated as a Rule 59(e) motion does in fact fall within the parameters for which the rule is designed. Nonetheless, we believe that result is mandated by the Supreme Court's decision in *Buchanan* [*supra*]. We recognize that in some cases there may be sufficient ambiguity in the motion itself to lead a court of appeals to hold that the motion acted as a Rule 59(e) motion, in this case it is clear that the motion was designed for only one purpose, *i.e.* to permit the taxation of costs on behalf of the successful party. Thus, on its face, it was collateral to the merits, and there was no ambiguity." *Fincher v. Keller Industries, Inc.* 905 F.2d 691, 693-94 (3d Cir. 1990).

In the instant case, there was no ambiguity on the face of the Motion. It was styled as a Motion for Relief from Judgment, Motion to Amend Judgment, and it invoked Rule 59(e).

Further, the Attorney General's Motion went beyond the simple issue of costs, and went to the fundamental issue of responsibility for releasing Redner from custody.

Therefore, the Eleventh Circuit properly construed the Motion as a Rule 59(e) Motion which had the effect of nullifying the pending Notice of Appeal.

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CONCLUSION

The Circuit Court correctly analyzed the Attorney General's Motion as a Rule 59(e) Motion which nullified the Notice of Appeal, and was therefore correct in its dismissal of the appeal below.

This Court should affirm the result reached by the Eleventh Circuit, and deny Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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